124 FERC ¶61,063
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Finavera Renewables Ocean Energy, Ltd. Project No. 12751-002

ORDER ON REHEARING AND CLARIFICATION

(Issued July 18, 2008)

1. The National Oceanic and Atmospheric Administration (NOAA) has filed a timely request for rehearing of the Commission's March 20, 2008 Rehearing Order,[1] which clarified and amended the Commission's December 21, 2007 order issuing an original license to Finavera Renewables Ocean Energy, Ltd. (Finavera) for the 1-megawatt Makah Bay Offshore Wave Pilot Project (Makah Bay Project).[2] The project will be located in the Pacific Ocean in Makah Bay, about 1.9 nautical miles offshore of Waatch Point in Clallam County, Washington.

2. For the reasons discussed below, we are clarifying the rehearing order and otherwise denying rehearing.

Background

3. On December 21, 2007, the Commission issued an order granting Finavera's application for a license for the Makah Bay Project. The order stated that the project would occupy about 28.3 acres of the Olympic Coast National Marine Sanctuary, which is located off the coast of the State of Washington and is administered by the National Marine Sanctuary Program (Sanctuary Program Group) within NOAA.[3] Notwithstanding an argument to the contrary by the Makah Indian Tribe, the order concluded that the Sanctuary was a "reservation" such that NOAA had the authority to impose mandatory

[1] 122 FERC ¶ 61,248 (2008) (March 20 Rehearing Order).

[2] 121 FERC ¶ 61,288 (2007).

[3] *Id.* at P 21.

license conditions under section 4(e) of the Federal Power Act (FPA).[4] The license therefore included 10 section 4(e) conditions submitted by NOAA.[5]

4. The State of Washington, Department of Natural Resources (Washington DNR) and the Tribe sought rehearing of the license order. They argued that, although the lands to be occupied by the project were indeed within the Olympic Coast Sanctuary, those lands were nonetheless owned by the state and managed by Washington DNR. Thus, the lands were not part of a federal reservation and section 4(e) did not apply to them. By letter dated January 25, 2008, the Sanctuary Program Group agreed that the lands at issue were owned by Washington, but contended that its management authority over the sanctuary gave it an interest in the lands sufficient to constitute a reservation.

5. In the March 20 Rehearing Order, the Commission found Washington DNR's and the Tribe's arguments persuasive. We explained that the Supreme Court, in the *Federal Power Commission v. Tuscarora Indian Nation*,[6] had concluded that the term "reservation" was confined to lands owned by the United States or those in which it owns a propriety interest. Thus, because the United States has the authority to regulate the use of sanctuary resources lands, but no property interest in lands owned by the state, we concluded that it does not have section 4(e) authority over the project.[7] We nonetheless adopted all but two of the measures proposed by the Sanctuary Program Group.[8]

6. On April 18, 2008, NOAA filed a timely request for rehearing of the March 20 Rehearing Order, arguing that we had erred in concluding that it did not have section 4(e) authority with respect to the lands within the sanctuary on which the project would be located.

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[4] *Id.* at P 23, n.26.

[5] *Id.* at P 33-35 and Appendix A.

[6] 362 U.S. 99, 113 (1960).

[7] 122 FERC ¶ 61,248 at P 26.

[8] *Id.* at P 27. We concluded that a measure requiring an assessment of electromagnetic field (EMF) levels at the project was largely redundant of another license condition and that we would not reserve to the Sanctuary Program Group the authority to add license conditions in the future, but that a standard license condition reserved the Commission's authority to amend the license on the request of resource agencies such as the Sanctuary Program Group.

Discussion

7. Under the FPA section 4(e), a hydropower license issued under the FPA Part I within a reservation of the United States "shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation." Section 3(2) of the FPA defines "reservation" as "national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes . . . ."[9]

8. As Washington DNR explained on rehearing – and NOAA does not contest – when Washington became a state in 1899, it claimed title to a swath of the submerged lands of the Pacific Ocean extending from the state's coast seaward one marine league.[10] In passing the Submerged Lands Act in 1953, Congress reaffirmed the State's ownership of those submerged lands to three nautical miles from the coast.[11] Washington claims ownership of its aquatic lands (including those where the project will be located, 1.9 nautical miles from the coast) in fee simple absolute, and has delegated management authority over those lands to Washington DNR.[12]

9. In 1972, Congress passed the National Marine Sanctuaries Act.[13] That Act established a regime under which the Secretary of Commerce would "identify and designate as national marine sanctuaries areas of the marine environment which are of special national significance and . . . manage these areas as the National Marine Sanctuary System."[14] During the designation process, the Secretary is to evaluate, among other things, "the advantages of cooperative State and Federal management if all or part of [a] proposed sanctuary is within the territorial limits of any State or is superadjacent to the subsoil and seabed within the seaward boundary of a State, as that boundary is established under the Submerged Lands Act."[15] Nothing in the National Marine

[9] 16 U.S.C. § 796(2) (2000).

[10] *See* Washington DNR's January 18, 2008 request for rehearing at 4, *citing* Washington's State Constitution, Article XXIV.

[11] *See* 43 U.S.C. § 1311, 1312 (2000).

[12] Washington DNR request for rehearing at 4-5.

[13] 16 U.S.C. § 1431, *et seq.* (2000).

[14] 16 U.S.C. § 1431.

[15] 16 U.S.C. § 1434(2)(C)(iv) (2000).

Sanctuaries Act states that lands within marine sanctuaries become the property of the Federal government or otherwise authorizes the United States to acquire interests in sanctuary lands.

10. On May 11, 1994, the Secretary of Commerce designated the Olympic Coast Sanctuary, including within its geographic and jurisdictional boundaries state lands and waters, among them the area in which the Makah Bay Project is proposed to be located.[16] The designation of the Olympic Coast Sanctuary did not assert title to, or otherwise purport to oust Washington's fee ownership of, state-owned lands within the sanctuary.[17]

11. NOAA seeks rehearing of the Commission's determination that the Olympic Coast Sanctuary is not a federal reservation and, consequently, that the Sanctuary Program Group lacks the authority to condition the Makah Bay Project license under section 4(e).

12. NOAA does not assert that the lands in the marine sanctuary constitute "national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws." Rather, it argues that its management authority amounts to "land and interests in land acquired and held for any public purpose," and contends that the Commission's definition of that clause is too narrow. According to NOAA, the term "acquired and held" does not imply ownership, but rather is properly interpreted to mean "any legal right, privilege or power over lands of which the United States has gained control and is presently occupying and administering for the benefit of the citizens of the United States."[18]

13. We find no support for NOAA's construction of the FPA. Instead, we believe the words "acquired" and "held" should be given their plain meaning. "Acquire" is defined as "to get as one's own: to come into possession or control of . . . ."[19] "Hold" is defined as "to have possession or ownership of."[20] In both instances, the term "possession" is used. In the case of the lands underlying the Sanctuary, there is no dispute that they are owned or possessed by Washington, not by the United States. NOAA asserts, without

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[16] 59 Fed. Reg. 24,603 (May 11, 1994).

[17] As noted above, in its January 25, 2008, letter, the Sanctuary Program Group states that the Olympic Coast Sanctuary is a regulatory overlay on the state's submerged lands and does not give the Sanctuary Program Group a proprietary interest in those lands.

[18] NOAA request for rehearing at 4.

[19] Merriam-Webster's online dictionary, www.merriam-webster.com/dictionary.

[20] *Id*.

support, that its management interest in the sanctuary somehow indicates that it has acquired or held the state lands. Finding no support for this interpretation, we reject it.

14. NOAA also asks the Commission to consider the Sanctuary Program Group's interest in the suspended waters of the sanctuary a reservation. A distinction is made throughout the FPA between the waters within a project and the lands on which the project is located. For example, the Commission has authority to issue licenses under section 4(e) for projects "along, from, or in any of the streams of other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States…." 16 U.S.C. 797(e). Likewise, the mandatory licensing provisions in section 23(b)(1) of the FPA require a Commission license to construct, operate, or maintain a project "across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States." 16 U.S.C. 816(b)(1). The waters within the sanctuary fall are covered by section 3(8) of the FPA, which defines navigable waters as "those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states…." 16 U.S.C. 796(8). The FPA's definition of reservation refers to lands and interests in lands, not waters, and the distinction made between waters and lands throughout the FPA leads us to conclude that the suspended waters within a sanctuary are not by themselves a reservation.

15. It is also the case that NOAA's interpretation of "reservation" would, if accepted, vastly expand the scope of section 4(e) to cover essentially any lands over which the United States exercises any regulatory authority. For example, under the Endangered Species Act (ESA), the Secretaries of Commerce and the Interior can designate critical habitat for listed species. Nothing in the ESA remotely suggests that the government acquires a property interest in lands when such habitat is designated. Yet under NOAA's theory, where the federal government elected to exercise ESA "power over lands," those lands would become reservations. This is inconsistent with the plain language and the limited scope of the FPA's definition of reservation. [21]

[21] It is worth noting that there are two classes of federal land: public domain land and acquired land. Public domain land is original government land that has never left federal ownership, while acquired land is land that the government obtained through purchase, condemnation, gift, or exchange. The withdrawal/reservation device historically developed as a tool for preserving public domain land, rather than acquired land, from disposal in order to accomplish federal purposes or policies. *See United States v. City and County of Denver*, 656 P.2d 1, 5 (Colo. 1982). The second clause of the definition of reservation found in the FPA was not added, as NOAA suggests, to expand the types of interests covered by the term beyond proprietary interests in land, but instead, was added

16. NOAA also argues that the Commission misread *Tuscarora*. In that case, the Supreme Court concluded, based on its analysis of the plain words and legislative history of the FPA, that "the term 'reservations' is confined, as Congress evidently intended, to those located on 'lands owned by the United States' or in which it owns a proprietary interest."[22] NOAA argues that the Court's holding in *Tuscarora* is inapposite to the question of whether a marine sanctuary falls within the FPA's definition of reservation because the land at issue in *Tuscarora* was not held or acquired for a public purpose, but rather was held in fee by the Tribe alone, and that the Court therefore had no need to examine whether the second clause of the definition under the FPA would apply. However, the interest that the *Tuscarora* Court was interpreting in light of the FPA was not a property interest in the tribal lands at all, but rather a "paternal interest" in the welfare and protection of Indians.[23] The Court found that a non-proprietary interest in protection was not sufficient to fit the lands at issue within the definition of a reservation under the FPA. The Court did so after its consideration of the legislative history and constitutional context of the FPA led it to conclude that the term "reservation" is confined to lands owned by the United States, or in which it owns a proprietary interest.

17. The *Tuscarora Court* explained the constitutional context of section 4(e) as evidence that Congress intended to limit reservations to those located on lands owned by the United States or in which it owned a proprietary interest. Specifically, the Court stated that after Congress authorized the Commission to license projects in streams and other bodies of water over which it has jurisdiction under the Commerce Clause of the Constitution, Congress then authorized the Commission to license projects "upon any part of the public lands and reservations of the United States."[24] The Court further stated that "Congress must be deemed to have known, as this Court held in *Federal Power Comm'n v. Oregon*, 349 U.S. 435, 443, that the licensing power, 'in relation to public lands and reservations of the United States springs from the Property Clause' of the Constitution."[25] The Court concluded that Congress must have intended to deal only with the "Territory or other Property belonging to the United States."

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to avoid the inconsistent result of protecting public domain land that had been set aside for some public purpose, but not acquired land also held for a public purpose.

[22] *Id.* at 113.

[23] *Id.* at 115.

[24] *Id.*

[25] *Id.*

18. The holding in *Tuscarora* not only comports with our common sense reading of FPA section 3(2), but it also is governing here. NOAA's attempt to limit the scope of the Supreme Court's holding is unconvincing.

19. We do not dispute NOAA's assertion that Congress established the National Marine Sanctuary Program "to protect these national and internationally recognized unique and valuable marine ecosystems,"[26] and we appreciate the importance of these valuable areas. However, neither that fact nor the legislative history cited by NOAA[27] allows us to conclude that the federal interest created by the National Marine Sanctuaries Act was an ownership interest allowing NOAA to exercise section 4(e) authority with respect to the lands at issue here.

20. The Supreme Court has held that, in cases where a reservation might be affected by Commission-licensed projects, but would contain no project works, the department managing the reservation cannot exercise authority under section 4(e). Rather, it is the Commission's duty in those instances to exercise its own authority to require a licensee to structure a project so as to avoid undue injury to the reservation.[28] Such situations are analogous to the present case, where our conclusion that NOAA cannot exercise authority under section 4(e) in no way vitiates our responsibility to safeguard the public interest by protecting marine sanctuaries. We take that responsibility seriously and believe that we have properly exercised it in this proceeding by imposing conditions that will protect the sanctuary.[29]

21. NOAA asks that if the Commission does not reverse its holding regarding section 4(e), the Commission amend the order to state that no activities can take place under the license until the applicant obtains a sanctuary permit from NOAA. Because we have no jurisdiction under the National Marine Sanctuaries Act, we see no need to amend the license or our prior orders. We clarify, however, that nothing in the license or in our

[26] NOAA request for rehearing at 8.

[27] *Id*. at 8-16.

[28] *See Escondido Mutual Water Company v. La Jolla Band of Mission Indians*, 466 U.S. 765, 780-84 (1984).

[29] Indeed, NOAA raises no substantive complaint regarding the contents of the license, but only the procedural issue that we have not guaranteed it the ability to issue new conditions during the term of the license. As we have explained, however, we have reserved our authority to reopen the license in response to a request by NOAA.

orders is intended to suggest that Finavera is not obligated to comply fully with the dictates of the National Marine Sanctuaries Act or NOAA's regulations thereunder.[30]

The Commission orders:

The Commission's March 20 Rehearing Order is clarified to the extent set forth herein and is otherwise denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

[30]NOAA notes that it has not pursued a formal consultation process with the Commission under the National Marine Sanctuaries Act, 16 U.S.C. § 1434(d) (2000), and states that it deems the consultation requirement fulfilled by the Commission in this instance.